

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In re

Amendment of Part 74 of the  
Commission's Rules Governing  
Use of the Frequencies in the  
Instructional Television  
Fixed Service

MM Docket No. 93-106

To: The Commission

SUPPLEMENTAL REPLY COMMENTS OF  
TRANS VIDEO COMMUNICATIONS, INC.

FEDERAL COMMUNICATIONS  
COMMISSION  
OFFICE OF THE  
SECRETARY

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Trans Video Communications, Inc. ("TVC") submits these Supplemental Reply Comments in connection with the Commission's Order Granting Extension of Time in the above-referenced docket, DA 93-1161 (released September 28, 1993). Pursuant to the Notice of Proposed Rule Making, FCC 93-183 (released April 26, 1993) ("NPRM"), TVC submitted comments and reply comments regarding the proposed channel-loading rules. In these comments, TVC expressed its fundamental concerns about the inevitable impairment of ITFS which would result if the Commission adopted the proposed rules.

The compromise simply concedes to MMDS interests everything they wanted with respect to channel-loading, on one condition: leases and program schedules consistent with the compromise would not be used as a basis for MMDS operators to seek reallocation of non-loaded ITFS spectrum in the future. ITFS systems which channel-load in accordance with these rules would concede their greatest value -- simultaneous multichannel service -- effectively eviscerating true instructional television service to schools.

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I. EVEN IF THE COMPROMISE WERE ADOPTED, USE OF CHANNEL-LOADING WOULD BE INCONSISTENT WITH THE COMMUNICATIONS ACT.

As discussed in TVC's comments, channel-loading is inconsistent with and impermissible under the Communications Act of 1934. The "compromise" ignores these issues, but the Commission cannot.

First, the Commission itself recognized only three years ago that channel-loading is impermissible under the Act. The Commission previously pointed out that an argument "favoring any use of the [ITFS] spectrum that provides financial support as within the ambit of the allocations is fundamentally flawed, however beneficial such financial support for educational institutions may be" because:

Such action would amount to a de facto reallocation of the spectrum, and the reallocation decision would be made in each case by an individual licensee on the basis of its own self-interest. In view of the current allocation, this effectively amounts to an abdication of the Commission's responsibility and a violation of the Communications Act.

Wireless Cable Order, 5 FCC Rcd 6410, 6416 (1990).

Second, by adopting the proposed channel-loading compromise, the Commission would effectuate a de facto reallocation of the only spectrum dedicated to instructional use in exchange for a commercial entertainment service. The Commission has gradually decreased protection for the ITFS spectrum reservation through a series of modifications to the ITFS rules. See, e.g., Wireless Cable Order, 5 FCC Rcd 6410 (1990), modified on recon., 6 FCC Rcd 6764 (1991). The proposal here, however, as discussed in TVC's initial Comments (at 3-8), would result in de facto reallocation

because channel-loading is inconsistent with the primary purpose for which the frequencies were allocated and would permit use of the frequencies by a previously ineligible class of users. ITFS facilities which employ channel-loading would not be able to fulfill the instructional purpose which was the reason for the ITFS allocation, and the primary use of the channels would be converted to entertainment service, not instructional use. Users would be persons seeking entertainment, not students seeking course credits toward degrees.

Third, there is no evidence whatsoever that, if adopted, channel-loading as envisaged by the proposed compromise would "benefit and nurture ITFS operations," as the Commission has suggested. NPRM, ¶ 17. The compromise would facilitate the use of ITFS frequencies by MMDS entities, but would do nothing to allay the serious adverse effects on the instructional value of ITFS channels. Stripped of excess verbiage, the essential purpose of an MMDS-ITFS partnership is to discourage use of airtime for ITFS programming. Neither the Commission nor the parties supporting the compromise have pointed to any reason why encouraging conversion of ITFS spectrum to entertainment programming use benefits ITFS. The proposed use of channel-loading clearly does not benefit ITFS.

Because channel-loading is inconsistent with the Communications Act and the public interest, the proposed use of channel-loading and the compromise should be rejected.

## II. IF ADOPTED, THE COMPROMISE MUST INCLUDE STRICT CONTROLS ON CHANNEL-LOADING.

As discussed in the initial Comments of TVC (at 14-18), if the Commission were to permit channel-loading despite its lack of public interest benefits, the Commission must impose strict limits on channel-loading.

1. Sunset Provision. The Commission should include a sunset provision that will ensure the automatic termination of the channel-loading rules. No extension of the sunset date should be granted except on a clear showing that continuation of channel-loading would be in the public interest. As recommended by TVC in its Reply Comments (at 7), the sunset provision should be certain and provide for termination of the rules within two years.<sup>1/</sup>

2. Lease Agreements. The Commission must require restrictions in ITFS lease agreements which propose channel-loading to preserve instructional use of the frequencies, including the following:

A. An MMDS operator should not be allowed to condition an airtime lease agreement on requiring use of channel-loading. Because MMDS operators are likely to pressure ITFS licensees into permitting channel-loading, the Commission should treat channel-loading, if allowed, with disfavor, to be employed only with express written consent of the ITFS operator.

B. Each ITFS lease agreement should also provide that ITFS program hours are subject to recapture with no more than six

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<sup>1/</sup> At a minimum, the effects of the rules should be fully reviewed after two years.

months' notice. This would make it possible to recover the capability to provide simultaneous multichannel service within the school year. Each ITFS licensee must be able to use its licensed frequencies when its instructional needs dictate.

C. An ITFS licensee proposing to lease one or more channels for 24 hours a day should be required to fulfill its ITFS programming requirements on the remaining channels during the time period 8:00 a.m. through 4:00 p.m., Monday through Friday. This period can reasonably be judged to be instructional time, i.e., when a student or teacher audience is available. If programming to meet ITFS requirements is scheduled during the 4:00 p.m. to 12:00 a.m. time period, the licensee should be required to demonstrate that the programming will be used for instructional purposes.

3. Avoiding Interference. The Commission must also take steps to guarantee that 24-hour-a-day commercial programming on ITFS stations does not (a) technically interfere with existing primary ITFS operations or (b) preclude initiation of service from new ITFS stations which would otherwise be eligible for authorization.

4. New ITFS Applicants. With respect to future ITFS applicants, the Commission should adopt rules to promote use of ITFS frequencies for instructional rather than commercial purposes:

A. An ITFS applicant proposing to use ITFS channels primarily for instructional programming should receive a

preference over applicants proposing substantial leased transmissions.

B. ITFS applicants proposing substantial leased operations should be required to present a "heightened demonstration" of their educational intent and need, including specific evidence of current or future use of four channels for instructional purposes.

These and other safeguards are discussed in TVC's initial Comments (at 14-18) and Reply Comments (at 7-9) for existing ITFS facilities and future ITFS applicants, and these discussions are hereby incorporated by reference.

### III. CONCLUSION.

For the reasons outlined above and in the initial and reply comments of TVC, the proposed compromise and channel-loading rules should be rejected. However, if channel-loading is permitted, then the Commission should put into place strict safeguards to ensure to the maximum extent feasible preservation of the ITFS spectrum for its instructional purposes.

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Dated: October 28, 1993

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of October 1993, I have caused to be served a copy of the foregoing Supplemental Reply Comments of Trans Video Communications, Inc. by hand delivery (indicated with \*) or by U.S. first-class mail, postage pre-paid, on the following:

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